
Volterra Fietta Virtual Seminar
15 July 2020

Disputes under Joint Operating Agreements

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Speakers today are:

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Agenda

1. JOAs and their importance in upstream oil & gas business
2. Common themes and fundamental principles in JOAs
3. Customary industry practices that parties expect in JOAs
4. Factors that international arbitral tribunals consider
5. Kinds of disputes that commonly arise under JOAs
6. Some examples of international JOA disputes

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Importance of JOAs

- JOA is most significant contract used in upstream business between O&G Companies
- Sets out fundamental and overarching relationship among joint venture parties from exploration to production of hydrocarbons
- JOA is essentially a Risk Allocation Business Model
 - Parties are jointly & severally liable to grantor who can enforce entirety of concession terms & obligations against any single party
 - JOAs are designed to manage this risk by reallocating and limiting joint and several liability amongst parties
 - It does this by providing that parties' liabilities are apportioned amongst themselves according to their predetermined shares
- Allows O&G company to pursue multiple opportunities for same overall cost
- Combines expertise of companies: Technical - Operational – Political - Financial
- All O&G companies, big and small, use this risk allocation model in form of JOAs

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Purpose of JOAs

- Provides decision-making process amongst joint venture companies
- Provides for conduct & funding of joint operations to perform obligations under granting instrument
- Allocates benefits, costs and liabilities amongst companies based on respective interests in joint venture consortium
- Designates operator to manage joint operations on behalf of JOA parties
- Provides mechanisms to allow less than all parties to conduct operations

Fundamental Principles of JOAs

- All Joint Operations must be approved: AFE or WP&B (Emergency Exception)
- Each party must pay its share at all times: “*Pay Now, Argue Later*”
- Non-Operators protected by approval and audit process
- Operator Autonomy/Authority: Domestic vs. International Operations
- Encourages exploration & development without forcing every party to participate and allowing independent proposals
- Not partnership, agency, trust or fiduciary relationship

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Factors in Arbitral Award Decisions

- Fact Matrix
- Terms of Contract
- Case Law
- Customary Industry Practice
- Governing Law

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Kinds of JOA Disputes

- Approval of Joint Operations
- Accounting Procedure
- Default
- Scope of Operator's Duties/Authority
- Removal of Operator
- Limitation of Liability and Indemnities
- Non-Consent or Exclusive Operations
- Transfer and Pre-emption Rights

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Kosmos Energy Ghana HC v Tullow Ghana Limited*

- Dispute over Approval of Joint Operations
 - ✓ Deepwater Tano JOA Offshore Ghana
 - ✓ Tullow was operator, Kosmos was non-operator
- Tullow had drilling contract with Seadrill West Leo drilling rig
- Charged West Leo cost to Joint Account after approved drilling program ended
 - ✓ Deepwater Tano OpCom had approved wells but not contract
 - ✓ US\$50.8 million was Tullow's estimate of Kosmos's share
- June 2016 Kosmos filed Request for Arbitration with the ICC Court
 - ✓ Tribunal ruled in favor of Kosmos, not requiring it to pay Tullow for West Leo
 - ✓ Seadrill sued Tullow for US\$254 million in English court case

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- 2018 Unpublished ICC case
- Seadrill Ghana Operations Limited v Tullow Ghana Limited, [2018] EWHC 1640

Unpublished Case - U.S. Federal Chapter 11 Bankruptcy*

- Dispute over Accounting Procedure.
 - Residual value of above ground equipment (AGE), future revenues, and operating costs.
- Parties A and B operated under a JOA that utilized the American Association of Petroleum Landmen Form 610, a Farmout Agreement, and Capital Recovery Agreement that allocated costs of drilling, completing, operating all production and saltwater disposal (SWD) wells, and all AGE.
 - Party A contributed reserves, owned and operated 100% of the SWD wells, and received 30% of hydrocarbon production.
 - Party B contributed technology, equipment, and received 70% of the hydrocarbon production.
 - Parties paid pro rata for SWD costs.
- After price crash, Party B declared bankruptcy, proposed settlement that Party A deemed unreasonable.
- Baker & O'Brien retained as expert, delivered Expert Report and testified on valuation and reasonableness of JOA.

ICC Case No. 11663*

- Dispute over Default/Forfeiture/Removal of Operator
- Involved Shared Management Agreement (SMA), which was JOA for paying parties
- Operator consistently failed to pay its share of cash calls
- Tribunal decided that:
 - ✓ Fundamental principle of JOAs that each party must pay its share of cost and expenses
 - ✓ If defaulting party remained in default for more than 60 days after receipt of default notice it shall upon request forfeit and assign its Participating Interest to that party
 - ✓ Defaulting party remained liable for its proportionate share of all costs and penalties
 - ✓ Declined to grant the equitable remedy of relief from forfeiture
 - ✓ Management committee had right to remove and replace operator

ICC Case No. 5*

- Dispute over Scope of Operator's Duties/Authority.
- JOA between a National Oil Company (NOC) as non-operator and the operator.
- Dispute concerned steps taken by operator in award and management of contract for construction of a gas pipeline to bring gas onshore.
- NOC alleged that operator breached its obligations under JOA by:
 - Conducting uncompetitive bidding process for award of pipeline contract;
 - Not claiming a penalty for late completion of the work by the contractor; and
 - Amending the pipeline contract after award, which caused non-operator to incur additional costs.
- The tribunal concluded that all of non-operator's claims failed on the facts.
 - Operator had followed bidding process in JOA, non-operator had approved decision.

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* JOAs in the International Oil & Gas Industry: ICC Arbitral Awards, ICC Dispute Resolution Bulletin, 35 Issue 3 (2019), Tim Martin, John Gilbert & Martin Gusy

